Public Prosecutor v Abdul Rahman bin Ab Shatar & Ors

HIGH COURT (ALOR SETAR) — CRIMINAL TRIAL NO 45A-30–09 OF 2015
CHAN JIT LI JC
22 MARCH 2019

Criminal Law — Dangerous drugs — Trafficking — First, second and third accused charged with trafficking in cannabis — Whether there was evidence of common intention — Whether prosecution established prima facie case against three accused — Whether there was material discrepancy in identification, description and weight of drugs — Whether defence created reasonable doubt in prosecution's case — Dangerous Drugs Act 1952 s 39B(1)(a) — Penal Code s 34

Corporal Muhd Dahalan bin Yunos ('PW5') who was attached to Bukit Aman was directed to report for duty at the Kedah Police Contingent headquarters ('IPD Kulim'). Detective Sub-Inspector Rajah ('DSI Rajah') informed him that he was required to be an undercover agent in a drug trafficking activity at Padang Serai, Kedah. DSI Rajah introduced PW5 to a person whom PW5 referred in his testimony as a registered source. In the meeting with the source, he was told that he will be introduced to a drug supplier called 'Man Polong'. When they arrived at the meeting venue, the source made a telephone call to Man Polong and he arrived in a Proton Wira. PW5 identified the first accused as the said Man Polong. On 10 December 2014, PW5 informed the first accused that he had arrived at the Padang Serai KFC. The first accused arrived on a motorcycle with his younger brother where PW5 had identified as the second accused. The first accused instructed the second accused to return to their tomyam shop by himself. The first accused chose to travel with PW5 in the Perdana. By doing so, the he was able to count the money and also to lead the way to the tomyam shop. On reaching the shop, the first accused instructed PW5 to park at the shop's back lane. The first accused requested PW5 to remain outside the shop at the back lane and he himself entered the shop. Some 20 minutes later, PW5 noticed the presence of a Toyota Wish reversed into the back lane. The first accused alighted from the said car with the third accused asked PW5 to come to the car to check the drugs. After seeing the substances suspected to be dangerous drugs, PW5 took off his 'kopiah'. Upon seeing PW5 giving the agreed signal to strike, the raiding officer, Insp Samsualan bin Samsudin ('PW8') had instructed his men to move in. All the three accused were successfully apprehended. PW8 seized two bags on the rear passenger seat of the Toyota Wish and brought them together with the accused persons to IPD Kulim. Thereafter, PW8 handed the police report, the arrested persons and the seized items over to the investigating officer ASP Syaifol Amir bin Mohd Sharif ('PW9'). PW9 found out from the JPJ records that the Toyota

Wish was registered in the name of a female known as Norsyakilla bt Sharif ('Norsyakilla'). On 14 December 2014, PW9 surrendered the substance suspected to be dangerous drugs to a chemist named Haslinda bt Ismail for an analysis. At the close of the prosecution's case the learned public prosecutor submitted that the prosecution had established a prima facie case. Learned counsel for the accused persons submitted that the accused persons should be acquitted as the prosecution had failed to show that the drugs tendered in court were seized by PW8 on the day in question. He also submitted that the drugs tendered in court must be the drugs which Inspector Tan Cheng Yee had recovered at the first floor of the shop when he arrested one Saharbuddin bin Ab Shatar ('Saharbuddin') on the same day. According to the learned counsel, this was evident from the material discrepancies in PW5's and the chemist's testimonies. In addition, there was also an unexplained weight difference of 4,449g in the weight of the drugs as stated in the search list and in the chemist report.

Held:

(1) Learned counsel's submission was without merit. To say that the chemist described the packets of drugs as 'balutan aluminium' only was an incomplete and erroneous reference of the chemist's evidence. There was no material discrepancy between PW5's and the chemist's identification and description of the drugs. Learned counsel had also failed to show that the alleged difference of 4,449g between the amount of drugs PW8 recovered and in the amount produced in court. There was no material discrepancy in the prosecution's case as to the description and weight of the drugs as alleged by learned counsel. There was therefore no basis for the court to believe that the drugs tendered in court were nor the drugs which PW8 seized on the day in question (see paras 34–36 & 39).

(2) Learned counsel's submission that the drugs in court were Saharbuddin's drugs was found to be without merit as the drugs recovered in relation to his arrest was minimal whereas the drugs tendered in court was more than 40kg (see para 40).

(3) All the markings and the chain of evidence were not challenged by learned counsel. There was therefore no break in the chain of evidence so as to render the identity of the drugs in court doubtful. The prosecution had shown that the drugs exhibits tendered in court were the drugs that were recovered from the Toyota Wish by PW8 on the day in question (see paras 42–43).

(4) The prosecution's failure to call Norsyakilla was not fatal to the prosecution's case as the case against the accused persons was not premised on custody or control of the drugs found in the Toyota Wish on

the night in question. The prosecution's case rested on the sale and purchase of the cannabis between the first accused and PW5 (see para 44).

(5) Premised on PW5's testimony, the evidence against the first accused was found to be overwhelming. The prosecution had succeeded in establishing a prima facie case against the first accused in respect of the charge. Accordingly, the first accused was directed to enter his defence (see para 47).

(6) Premised on PW5's and PW6's evidence, the court found it unsafe to impute guilt and knowledge of the drugs to the second and third accused's conduct of running away after the raiding party appeared at the scene. There was also evidence to show that the third accused had as early as the time of police investigation made an exculpatory statement. The prosecution had failed to establish the elements of s 34 of the Penal Code against both the second and third accused as stated in *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP* [1987] 2 MLJ 336. Accordingly, both the second and third accused were directed to be acquitted and discharged (see paras 52 & 56–57).

(7) The burden was on the defence and not the prosecution's burden to call Saharbuddin. PW5's evidence was not something so inherently improbable that the court should disbelieve him. The first accused's testimony was unsupported by any evidence. It amounted to only a bare denial. The defence had failed to create a reasonable doubt in the prosecution's case. Accordingly, the first accused was found guilty and convicted of an offence under s 39B of the DDA and sentenced to death by hanging (see paras 67–71).

[Bahasa Malaysia summary

Koperal Muhd Dahalan bin Yunos ('PW5') yang terikat dengan Bukit Aman diarahkan untuk bertugas di ibu pejabat Kontinjen Polis Kedah ('IPD Kulim'). Sub-Inspektor Detektif Rajah ('DSI Rajah') memaklumkan kepadanya bahawa dia dikehendaki menjadi agen pengintipan dalam aktiviti pengedaran dadah di Padang Serai, Kedah. DSI Rajah memperkenalkan PW5 kepada orang yang PW5 rujuk di dalam testimoninya sebagai sumber berdaftar. Dalam pertemuan dengan sumber itu, beliau diberitahu bahawa beliau akan diperkenalkan kepada pembekal dadah yang dipanggil 'Man Polong'. Ketika tiba di tempat pertemuan, sumber itu membuat panggilan telefon kepada Man Polong dan tiba dengan sebuah Proton Wira. PW5 mengenal pasti tertuduh pertama sebagai Man Polong tersebut. Pada 10 Disember 2014, PW5 memaklumkan tertuduh pertama bahawa beliau telah tiba di KFC Padang Serai. Tertuduh pertama tiba dengan sebuah motosikal dengan adiknya yang mana PW5 telah mengenalpasti sebagai tertuduh kedua. Tertuduh pertama mengarahkan tertuduh kedua untuk kembali ke kedai tomyam mereka secara

sendiri. Tertuduh pertama memilih untuk pergi dengan PW5 dengan Perdana. Dengan berbuat demikian, dia dapat mengira wang itu dan juga menunjukkan jalan ke kedai tomyam. Apabila sampai di kedai, tertuduh pertama mengarahkan PW5 untuk meletak kenderaan di lorong belakang kedai. Tertuduh pertama meminta PW5 untuk menunggu di luar kedai di lorong belakang dan dia sendiri memasuki kedai. Kira-kira 20 minit kemudian, PW5 melihat kehadiran sebuah Toyota Wish berundur ke lorong belakang. Tertuduh pertama yang turun daripada kereta tersebut dengan tertuduh ketiga meminta PW5 untuk datang ke kereta untuk memeriksa dadah. Selepas melihat bahan yang disyaki sebagai dadah berbahaya, PW5 mencabut kopiahnya. Apabila melihat PW5 memberikan isyarat yang disepakati untuk menyerang, pegawai serbuan, Insp Samsualan bin Samsudin ('PW8') telah mengarahkan anggotanya untuk masuk. Ketiga-tiga tertuduh berjaya ditangkap. PW8 merampas dua beg pada kerusi penumpang belakang Toyota Wish dan membawa mereka bersama orang tertuduh ke IPD Kulim. Selepas itu, PW8 menyerahkan laporan polis, orang-orang yang ditangkap dan barang-barang yang dirampas kepada pegawai penyiasat ASP Syaifol Amir bin Mohd Sharif ('PW9'). PW9 mendapati dari rekod JPJ bahawa Toyota Wish telah didaftarkan atas nama seorang wanita bernama Norsyakilla bt Sharif ('Norsyakilla'). Pada 14 Disember 2014, PW9 menyerahkan bahan yang disyaki dadah berbahaya kepada ahli kimia bernama Haslinda bt Ismail untuk analisis. Pada akhir kes pendakwaan, pendakwa raya yang bijaksana mengemukakan bahawa pihak pendakwaan telah menubuhkan kes prima facie. Peguam yang bijaksana untuk tertuduh menyampaikan bahawa orang yang dituduh patut dibebaskan sebagaimana pihak pendakwaan gagal menunjukkan bahawa dadah yang dikemukakan di mahkamah telah dirampas oleh PW8 pada hari tersebut. Beliau juga mengemukakan bahawa dadah yang dikemukakan di mahkamah pasti dadah yang Inspektor Tan Cheng Yee telah dapati di tingkat pertama kedai ketika dia menangkap seorang Saharbuddin bin Ab Shatar ('Saharbuddin') pada hari yang sama. Menurut peguam yang bijaksana, ini terbukti daripada percanggahan material dalam PW5 dan testimoni ahli kimia. Di samping itu, terdapat juga perbezaan berat yang tidak dijelaskan sebanyak 4,449g dalam berat dadah seperti yang dinyatakan di dalam senarai carian dan dalam laporan kimia.

Diputuskan:

(1) Hujahan peguam yang bijaksana adalah tanpa merit. Untuk hanya mengatakan bahawa ahli kimia menyifatkan paket dadah sebagai 'balutan aluminium' merupakan rujukan yang tidak lengkap dan salah bagi keterangan ahli kimia tersebut. Tidak ada percanggahan material antara PW5 dan pengenalpastian dan penghuraian dadah oleh ahli kimia. Peguam yang bijaksana juga gagal memperlihatkan perbezaan yang didakwa sebanyak 4,449g antara jumlah dadah PW8 dapati dan jumlah yang dikemukakan di mahkamah. Tidak ada percanggahan

material dalam kes pendakwaan mengenai penghuraian dan berat dadah seperti yang didakwa oleh peguam yang bijaksana. Maka tidak ada asas bagi mahkamah untuk mempercayai bahawa dadah yang ditender di mahkamah bukanlah dadah yang PW8 sita pada hari yang dipersoalkan (lihat perenggan 34–36 & 39).

(2) Hujahan peguam yang bijaksana bahawa dadah di mahkamah adalah dadah Saharbuddin didapati tidak sesuai kerana dadah yang diperolehi berkaitan dengan penangkapannya adalah minimum sedangkan dadah yang dikemukakan di mahkamah lebih daripada 40kg (lihat perenggan 40).

(3) Semua tanda dan rantaian keterangan tidak dicabar oleh peguam yang bijaksana. Oleh itu, tiada kekosongan dalam rantaian keterangan untuk menjadikan identiti dadah di mahkamah ragu-ragu. Pihak pendakwaan telah menunjukkan bahawa dadah yang ditender di mahkamah adalah dadah yang diperolehi dari Toyota Wish oleh PW8 pada hari yang dipersoalkan (lihat perenggan 42–43).

(4) Kegagalan pihak pendakwaan untuk memanggil Norsyakilla tidak membawa kesan buruk kepada kes pendakwaan memandangkan kes terhadap orang yang dituduh tidak didasarkan pada penjagaan atau kawalan dadah yang terdapat di Toyota Wish pada malam itu. Kes pendakwaan dilakukan atas penjualan dan pembelian kanabis antara tertuduh pertama dan PW5 (lihat perenggan 44).

(5) Berdasarkan pada testimoni PW5, keterangan terhadap tertuduh pertama didapati sangat luar biasa. Pihak pendakwaan telah berjaya menubuhkan kes prima facie terhadap tertuduh pertama berkenaan dengan pertuduhan itu. Oleh itu, tertuduh pertama diarahkan untuk memasuki pembelaannya (lihat perenggan 47).

(6) Berdasarkan keterangan PW5 dan PW6, mahkamah mendapati ia tidak selamat untuk menimbulkan kesalahan dan pengetahuan mengenai dadah kepada tertuduh kedua dan ketiga yang melarikan diri selepas pihak serbuan muncul di tempat kejadian. Terdapat juga keterangan untuk menunjukkan bahawa tertuduh ketiga telah seawal masa siasatan polis membuat kenyataan pembelaan. Pihak pendakwaan gagal membuktikan elemen s 34 Kanun Keseksaan terhadap tertuduh kedua dan ketiga seperti yang dinyatakan dalam *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP* [1987] 2 MLJ 336. Oleh itu, kedua-dua tertuduh kedua dan ketiga diarahkan untuk dibebaskan dan dilepaskan (lihat perenggan 52 & 56–57).

(7) Beban adalah pada pembelaan dan bukannya beban pendakwaan untuk memanggil Saharbuddin. Keterangan PW5 bukanlah suatu perkara yang tidak wajar kerana mahkamah harus tidak percaya kepadanya. Testimoni tertuduh pertama tidak disokong oleh sebarang keterangan. Ia berjumlah

hanya penafian kosong. Pembelaan gagal mewujudkan keraguan munasabah dalam kes pendakwaan. Oleh itu, tertuduh pertama didapati bersalah dan disabitkan dengan kesalahan di bawah s 39B ADB dan dihukum gantung sampai mati (lihat perenggan 67–71).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 886–1075.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)
Mat v PP [1963] 1 MLJ 263 (folld)
Mr Losali v PP [2011] 4 MLJ 694; [2012] 2 CLJ 178, CA (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (folld)
PP v Saimin & Ors [1971] 2 MLJ 16 (consd)
Rosenizam bin Maharam v PP [2003] 5 MLJ 49, HC (refd)
Saari bin Jusoh v PP [2006] 6 MLJ 117; [2007] 2 CLJ 19, FC (refd)

Legislation referred to

Criminal Procedure Code ss 173(f), 180, 277
Dangerous Drugs Act 1952 ss 2, 39B, 39B(2)
Evidence Act 1950 s 114(g)
Penal Code s 34

Sharifah Shazwani bt Syed Hussein (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Naran Singh (Naran Singh & Co) for the accused.

Chan Jit Li JC:

[1] The following charge was preferred against the three accused:

Bahawa kamu bersama-sama pada 10.12.2014, jam lebih kurang 9.30 malam, di belakang rumah kedai No 2266 dan 2267, Jalan Serai Wangi 10, Taman Serai Wangi III dan IV, 09400 Padang Serai, di dalam Daerah Kulim, di dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya, iaitu Cannabis seberat 40 751 gram. Oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama di bawah seksyen 34 Kanun Keseksaan.

A **[2]** Briefly the prosecution's case is as follows. On 5 August 2014 one Corp Muhd Dahalan bin Yunos (PW5) who was attached to Bukit Aman was directed to report for duty at the Kedah Police Contingent headquarters ('IPK Kedah')

B **[3]** On arrival at IPK Kedah, PW5 reported to a Detective Sub-Insp Rajah ('DSI Rajah'). According to PW5, DSI Rajah informed him that he was required to be an undercover agent in a drug trafficking activity at Padang Serai, Kedah. Thereafter, DSI Rajah introduced him to a person whom PW5 referred in his testimony as a registered source. This meeting with the source C also took place at IPK Kedah. In the meeting with the source, he was told that he will be introduced to a drug supplier called 'Man Polong'. Both of them (the source and PW5) parted way after this meeting.

D **[4]** PW5's next destination was a mosque at Bertam known as the 'Masjid Abdullah Fahim' ('the mosque'). He left IPK Kedah for the mosque with a policeman from the narcotics unit. At the mosque, PW5 met the source and DSI Rajah again. From here all of them left for Padang Serai. PW5 and the source travelled in the same car whilst DSI Rajah went in a different car. During the journey, the source informed PW5 that they were meeting Man E Polong. The meeting venue was at a Shell petrol station at Padang Serai.

[5] When they arrived at the said petrol station, the source made a telephone call to Man Polong. Soon a male Malay arrived in a Proton Wira. The source F told him that that was Man Polong and PW5 identified the first accused, Abdul Rahman bin Ab Shatar, as the said Man Polong.

[6] The source introduced him (PW5) to the first accused as 'Abang Bri'. The source also told Man Polong that PW5 was keen on purchasing drugs. Man G Polong answered that he (Man Polong) needed a day's to a week's notice before he could make a delivery. The meeting ended after this.

[7] PW5's second meeting with the first accused took place on 8 December 2014. This time the venue was at the KFC at Padang Serai. The source was also H present in this meeting. This time the first accused was accompanied by a male Malay. However, PW5 was not introduced to the said male Malay. At this meeting PW5 told the first accused that he wanted to purchase 50kg of *ganja*. They both agreed to the selling price of RM1,200 per kg. However, PW5 told the first accused that he (PW5) would first have to return to Sabak Bernam and I Selayang to collect payment from his customers. It was also at this meeting that the first accused showed PW5 the first accused's tomyam shop located at Taman Serai Wangi, Padang Serai, Kulim.

[8] When the meeting with the first accused ended, PW5 and the source

travelled to Sungai Petani to meet DSI Rajah. PW5 briefed DSI Rajah of what transpired at his meeting with the first accused. DSI Rajah instructed him to call the first accused to confirm the purchase. The first accused told him (PW5) that only 40kg of cannabis was available. PW5 agreed to purchase all of it. They agreed to communicate with each other via their mobile telephones. According to PW5, he used the number 013-5159091 whereas the first accused used 014-2406577.

[9] The raiding officer in this matter is one Insp Samsualan bin Samsudin (PW8) ('Insp Samsualan'). PW8 told the court that as a result of PW5's undercover activities, he held a briefing on 10 December comprising of two officers and 20 police personnel. PW5 was present in this meeting.

[10] Amongst the actions he took in this briefing was to appoint PW5 as the agent provocateur — drug buyer. One Detective Corp Akmarol Azhar bin Awaludin (PW6) ('Akmarol') was tasked with taking charge of the money and, hence, was appointed as the money man. It was also agreed that PW5 will take off his 'kopiah' to signal to the raiding party the appropriate time to raid. After PW8 handed Akmarol the cash of RM60,000 the raiding team left IPK Kedah in their respective vehicles. Both the agent provocateurs travelled in the same car. The car, a Proton Perdana, was driven by one Lance Corp Hafiz.

[11] All the teams including that of PW5 reconverged at the Bertam mosque at about 7pm. They were at the mosque for some 20 minutes before they left for Padang Serai. PW5's team was the first team to leave.

[12] On arrival at the Padang Serai KFC, PW5 first ensured that the rest of the raiding teams were in position before he made the call to the first accused. He informed the first accused that he had arrived. Both the same mobile telephone numbers were used. PW5 sat in the car together with Akmarol and Hafidz to await the first accused's arrival.

[13] Some 10–15 mins after the telephone call the first accused arrived at the KFC on a motorcycle. The first accused was the pillion rider whereas the rider was the same male Malay of the 8 December 2014 meeting. PW5 went forward to meet them. The first accused introduced the said male Malay as his younger brother called 'Ee'. In court, PW5 identified the second accused, Mohamad Sabree bin Ab Shatar, as the man 'Ee'.

[14] The first accused instructed the second accused to return to their tomyam shop by himself. He (the first accused) chose to travel with PW5 in the Perdana. By doing so, the first accused was able to count the money and also to lead the way to the tomyam shop.

[15] The shop was only a short distance away. On reaching the shop, the first accused instructed PW5 to park at the shop's back lane. The first accused alighted from the Perdana and walked towards the tomyam shop. PW5 followed the first accused some five minutes later. PW5 testified that said on arrival at the shop he found the back lane area brightly lit with white fluorescent lamps. PW5 saw the second accused at this back lane. He (the second accused) was in the midst of washing plates.

[16] The first accused requested that he (PW5) remain outside the shop at the backlane. However, the first accused himself entered the shop. Some 20 minutes later, PW5 noticed the presence of a white car. It was a Toyota Wish. This car reversed into the back lane. The first accused alighted from the said car with the third accused, Muhamad Norhisham bin Mansor and asked that he (PW5) come to the car to check the ganja. PW5 testified as follows:

> Man Polong buka pintu belakang kereta itu. Dia buka pintu belakang driver. Saya tak berapa nampak. Saya minta Man Polong buka lampu dalam kereta. Man Polong buka dan saya nampak.
>
> Saya nampak 2 beg hitam biru di belakang lalu dibuka zip oleh Man Polong dan menunjukkan bekalan dadah itu serta minta saya panggil kawan saya yang pegang wang menghampiri saya.
>
> Mula-mula saya di belakang Man Polong. Bila pintu dibuka saya di sisi pintu. Ee dan lelaki Melayu itu ada di pintu kiri (penumpang hadapan). Yang saya ingat kereta itu Wish Putih No AHF 2677.
>
> Beg-beg itu di tempat duduk belakang. Hanya ada 2 beg itu sahaja.
>
> Lepas Man Polong buka beg, dia suruh saya tengok isi dalam beg itu. Saya nampak jelas kandungannya berisi ketulan-ketulan ganja dalam balutan plastik jernih lutsinar.
>
> Beg itu beg pakaian, beg pegang. Beg berzip dan buka zip.

After seeing the substances suspected to be dangerous drugs, PW5 took off his 'kopiah' and waved purportedly to call Akmarol and Hafidz to come to the Toyota Wish. PW5 said all of a sudden there were people shouting and running around him. However, he did not stay around but left the scene together immediately with Akmarol and Hafidz.

[17] Inspector Samsualan who held the rank of 'ASP' at the time of the hearing was the prosecution's eighth witness. He told the court that the raiding party comprised of three teams. He headed the first team. PW8 testified that the place where he made the observation commanded a good view of the backlane of the tomyam shop. Hence, he was able to see what transpired after PW5 arrived at the scene. He corroborated PW5's testimony as to what transpired on the day of the incident.

[18] According to PW8, the second team was headed by one Insp Tan Cheng Yee ('Insp Tan'). Inspector Tan's team was positioned at the front of the same tomyam shop. As such, Insp Tan was able and had informed him of the movements of the Toyota Wish even before the car appeared on the scene.

[19] According to PW8, upon seeing PW5 giving the agreed signal to strike, he had instructed his men to move in. The three accused attempted to escape arrest by running away. The first and third accused ran into the tomyam shop while the second accused ran into the bushes at the backlane.

[20] Nonetheless, all the three accused were successfully apprehended. The first accused was arrested inside the tomyam shop. The third accused had already ran across the road in front of the shop by the time he was arrested. The second accused was arrested at the back of the shop near some bushes. After the arrest, he conducted a physical search on all the three persons but failed to recover any incriminating items on them.

[21] PW8 testified that after completing the body searches, he went over to the Toyota Wish to conduct a search of the car. He ensured that his search of the Toyota Wish was witnessed by the three accused. In the course of his search, he found two bags on the rear passenger seat. The bags were the only items on the seat. PW8 described both bags as follows:

> beg pakaian saiz besar berwarna hitam-biru yang bertulis 'Sports'.

The zip of one of the bags was opened.

[22] Next, he examined the contents of both the bags. In each of the bag he recovered

> 20 ketulan mampat foil yang dibaluti dengan plastic lutsinar. Kesemuanya da 40 ketulan. ...

[23] PW8 seized the items and brought the seized items together with the accused persons to IPD Kulim. At IPD, Kulim, amongst the steps PW8 took was to lodge a police report; Padang Serai Report No 3265/14 (exh P61) and mark and weigh the exhibits. Thereafter, PW8 handed the police report, the arrested persons and the seized items over to the investigating officer. Both PW8 and the investigating officer acknowledge the handing over by signing on the handing over form (*borang serah menyerah*) (exh P64).

[24] ASP Syaifol Amir bin Mohd Sharif (PW9), the investigating officer, told the court he received the following from PW8:

> Pada 11/12/2014 jam lebih kurang 3.50 pagi saya telah terima dari Insp Samsualan

b Samsudin (1) laporan polis, iaitu Padang Serai Rpt: 3265/2014, borang bongkar, berserta barang kes iaitu (2) beg pakaian bersaiz besar warna hitam biru bertulis 'sport' setiap satu bertanda 'S' dan 'SS' di mana di bahagian ruang tengah dalam setiap satu beg mengandungi (20) ketulan mampat disyaki dadah ganja yang setiap satunya dibaluti kertas foil berselotep dan dibungkus dengan plastic lut sinar bertanda 'S1' hingga 'S20' dan 'SS1' hingga 'SS20' (jumlah keseluruhan 40 ketulan mampat dadah disyaki ganja), sebuah kereta jenis Toyota Wish warna putih no pendaftaran AHF 2677, (1) batang anak kunci berlogo Toyota beserta 'remote control' serta (2) lelaki melayu iaitu (B1) Abdul Rahman bin Ab Shatar dan (B3) Muhamad Norhisham bin Mansor. Saya seterusnya menandatangani akuan serah terima barang kes dengan Insp Samsualan bin Samsudin. Saya juga telah dimaklumkan oleh Insp Samsualan bin Samsudin bahawa OKT (B2) Mohamad Sabree bin Ab Shatar telah mengalami kecederaan di bahagian kaki kiri akibat dari terkena tembakan dan telah dimasukkan ke wad 4 othopedik Hospital Kulim bagi tujuan rawatan.

[25] In the course of his investigations, PW9 had the packets of substance suspected to be drugs dusted for fingerprints. Although five fingerprints were successfully lifted he was informed by the Registrar of 'Pusat Pendaftaran Penjenayah Malaysia dan Singapura, Bukit Aman' that the comparison was unsuccessful 'kerana tidak cukup sifat'.

[26] He also conducted investigations into the Toyota Wish bearing registration No AHF 2267. His investigations revealed the following. The JPJ records showed that a vehicle bearing registration No AHF 2267 was registered in the name of a female known as Norsyakilla bt Sharif ('Norsyakilla'). Norsyakilla told him that her Toyota Wish had always been with her and there was no occasion in which someone borrowed her car.He also discovered that the JPJ records showed that the engine and chasis number which he took from the Toyota Wish seized by PW8 did not belong to the vehicle registered under Norsyakilla. As a matter of fact both the said engine and chasis numbers on the seized Toyota Wish could not be located in the JPJ computer system.

[27] According to PW9, PW5 provided him with two mobile telephone numbers. PW5 had informed him that both the numbers had been used in his (PW5) dealings with the first accused. PW5 had recorded both numbers in his investigation diary. PW9's investigations revealed that both the numbers, 014-2406577 and 017-4068958, were registered in the name of the first accused.

[28] PW9 said that on 14 December 2014, he surrendered the substance suspected to be dangerous drugs to a chemist by the name of Haslinda bt Ismail at the Chemistry Department of Malaysia at Alor Setar. PW9 requested for an analysis of the drugs to ascertain the nature and quantity of the substance suspected to be dangerous drugs.

[29] Haslinda bt Ismail (PW3) told the court that she received the exhibits from PW9 for the purpose of analysis. She had prepared a written witness statement (exh P14). From a reading of her witness statement, I am satisfied that she is an expert. PW3 told the court that from her analysis she found the substances from the bag marked 'S1' comprised of 20,814g of cannabis. She also found in the substances contained in the bag marked 'S2' to comprised of 19,937g cannabis. Her findings are reduced in writing in the form of her written report tendered and marked as exh P16.

[30] At the close of the prosecution's case, Puan Sharifah Syazwani bt Syed Hussin ('Puan Sharifah'), the learned deputy public prosecutor submitted that the prosecution had established a prima facie case. She submitted that there was a sale of the drugs as evidenced by PW5's testimony. By virtue of s 2 of the Dangerous Drugs Act 1952 (revised 1980) (hereinafter referred to as 'DDA') this act of selling amounts to trafficking.

[31] Section 2 of the DDA provides as follows:

> 2 Interpretation
>
> In this Act unless the context otherwise requires, ...
>
> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act; ...

[32] On the other hand, Dato Naran Singh, learned counsel for the accused persons submitted that the accused persons should be acquitted as the prosecution had failed to show that the drugs tendered in court were seized by PW8 on the day in question. He submitted that the defence had shown through a police report (exh D72) that one Saharbuddin bin Ab Shatar ('Saharbuddin') was arrested by Insp Tan on the same day. Saharbuddin was arrested on the firsts floor of the tomyam shop. Inspector Tan also recovered drugs in relation to this arrest.

[33] Dato Naran submitted that the drugs tendered in court must be the drugs which Insp Tan had recovered at the first floor of the shop when he arrested Saharbuddin. According to learned counsel, this is evident from the material discrepancies in PW5's and the chemist's testimonies. PW5 had described the drugs as wrapped in clear plastic ie 'balutan plastic jernih putih'. However, the chemist had described as the drugs as wrapped in aluminum foil ie 'balutan kertas aluminium'. In addition to that there was also a vast difference in the weight of the drugs as stated in the search list (exh P63) and in the chemist report. The raiding officer had stated that 45,200g of drugs had

A been seized. However, the chemist had stated that she found only 40,751g *ganja*. There was therefore an unexplained weight difference of 4,449g. Dato Naran further submitted that the prosecution should have called Saharbuddin and Insp Tan to explain the weight difference. And, as the prosecution failed to do so, s 114(g) of the Evidence Act 1950 should be invoked against the B prosecution.

[34] Upon examining both the oral and documentary evidence relied on by learned counsel I find with the greatest respect to the learned counsel that his submission is without merit. To say that the chemist described the packets of C drugs as 'balutan aluminium' only is an incomplete and erroneous reference of the chemist's evidence. In para 13 of her witness statement (exh P14) the chemist states:

> 13. Saya telah memeriksa kandungan kedua-dua kotak bertanda 'SA' dan 'SB' D tersebut dan mendapati di dalam:
>
> 'SA':Satu beg bertanda 'S1' berisi *20 balutan plastic* (masing-masing bertanda 'SA1' hingga 'SA20'), yang setiap satunya terdapat balutan kertas aluminium yang mengandungi ketulan mampat bahan tumbuhan.
>
> 'SB':Satu beg bertanda 'S2' berisi *20 balutan plastic* (masing-masing bertanda E 'SB1' hingga 'SB20', yang setiap satunya terdapat balutan kertas aluminium yang menagndungi ketulan mampat bahan tumbuhan. (Emphasis added.)

[35] On reading this, I find that there is no material discrepancy between F PW5's and the chemist's identification and description of the drugs. The alleged discrepancy submitted by learned counsel lies in PW5 giving a brief description of what he had fleetingly seen on the night in question while the chemist's testimony constitutes a detailed description of her examination.

G **[36]** Learned counsel has also failed to show that the alleged difference of 4,449g between the amount of drugs PW8 recovered and in the amount produced in court. The weight stated in the search list (exh P63) refers to the *gross weight* of the drug exhibits which PW8 seized. The weight which the learned counsel referred to substantiate his submission is the *nett weight* stated H in the chemist report.

[37] It will be pertinent to refer to paras 20, 21, 30 and 31 of the chemist's witness statement (exh P14). The chemist stated that she found the gross weight of the exhs S1–S20 to be 21,398g. However, the chemist found the nett I weight of the drugs to be 20,814g after removing the wrappings (the wrappings weighed 584g).

[38] In respect of the second bag containing exhibits marked SB1–SB20, she found the gross weight to be 20,803g. The wrappings of these exhibits was

866g. Therefore, the chemist's finding on the total gross weight of the drugs was 42,201g. As the gross weight listed in the search list is only 45,200g, there is no weight difference of 4,449g of drugs as submitted by learned counsel.

[39] After considering the evidence before me I find that there is no material discrepancy in the prosecution's case as to the description and weight of the drugs as alleged by learned counsel. There is therefore no basis for me to believe that the drugs tendered in court are nor the drugs which PW8 seized on the day in question.

[40] I also find by learned counsel's submission that the drugs in court are Saharbuddin's drugs to be without merit. This is because the drugs recovered in relation to his arrest was minimal whereas the drugs tendered in court is more than 40kg. The defence had relied on Insp Tan's police report (exh D72) in support of the counsel's submission. Inspector Tan had clearly stated the weight of the drugs recovered in respect of that arrest is the report as follows:

> Semasa pemeriksaan fizikal hendak dijalankan ke atas suspek, suspek telah serah pada saya (1) paket plastic lutsinar dalamnya berisi tumbuhan-tumbuhan kering disyaki dadah ganja *(B: 0.82 gram)* yang diambil dari dalam laci meja di ruang depan hadapan bilik tidur ketiga tersebut.

I find it impossible to believe that 0.82g of drugs can be mistakenly substituted for 40,751g. Incidentally, the weight of 40,751g is consistent with PW5's testimony that the first accused told him that only 40kg of cannabis was available for sale.

[41] I also took into consideration the chain of events relating to the drugs exhibit. PW8 had seized the drugs at the scene of incident. The drugs were found in two bags. PW8 testified that the two bags were the only items in the Toyota Wish. After effecting the seizure, PW8 had returned to IPD Kulim. The drugs were in his possession throughout the whole journey. At the police station PW8 had made his markings on the exhibits before he surrendered them to the investigating officer. The investigating officer made his own markings and kept it in safe custody until he surrendered the items to the chemist for analysis. The investigating officer re-took possession of the drugs from the chemist after the analysis. The drugs were kept in exhibit storeroom duly registered as exh 179/15 by PW1. PW1 one L/Corp Mohd Razali bin Desa who is the officer in charge of the exhibits store at district police station at Kulim and he produced the drugs in court.

[42] All the markings and the chain of evidence were not challenged by the learned counsel. There is therefore no break in the chain of evidence so as to render the identity of the drugs in court doubtful.

[43] In the final analysis, I find that the prosecution has shown that the drugs exhibits tendered in court are the drugs that were recovered from the Toyota Wish by PW8 on the day in question. In view of this finding, it is unnecessary for me to deal with the s 114(g) presumption raised by learned counsel on the prosecution's failure to call Saharbuddin and Insp Tan to confirm that the drugs in court are the drugs which PW8 seized.

[44] It is also my finding that the prosecution's failure to call Norsyakilla is not fatal to the prosecution's case. This is because the case against the accused persons is not premised on custody or control of the drugs found in the Toyota Wish on the night in question. The prosecution's case rest on the sale and purchase of the cannabis between the first accused and PW5.

[45] I now turn to the issue whether the prosecution has established a prima facie case against the three accused. After the amendments to ss 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a subordinate and the High Court under the amended sections is to call for the defence when it is satisfied that a prima facie case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. If the court upon a maximum evaluation of the evidence placed before at the close of the prosecution case, comes to the conclusion that a prima facie case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a prima facie case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him (see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

THE CASE AGAINST THE FIRST ACCUSED

[46] In the present case, guided by the aforesaid Federal Court case of *Public Prosecutor v Mohd Radzi*, I ask myself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence before me? If the answer to that question is in the affirmative, then the defence must be called. In the instant case, my answer to the question in respect of the first accused that I have just posed is in the affirmative.

[47] Premised on PW5's testimony I find the evidence against the first accused to be overwhelming. This is reflected in the first accused's acts in his three meetings with PW5. In the first meeting, the first accused confirmed that he was able to supply the drugs. In the second meeting he had negotiated with

PW5 over the price of the cannabis. In the third meeting he delivered the drugs subject to a payment of RM60,000. There is therefore a sale of the drugs (*Saari bin Jusoh v Public Prosecutor* [2006] 6 MLJ 117; [2007] 2 CLJ 19). Thus, after having made a maximum evaluation of the evidence adduced before me by the prosecution, in accordance with the principles as enunciated by *Public Prosecutor v Mohd Radzi*, and applying the statutory presumptions, I am satisfied that the prosecution has succeeded in establishing a prima facie case against the first accused in respect of the charge. Accordingly, I directed the first accused to enter his defence.

THE CHARGE AGAINST THE SECOND AND THIRD ACCUSED

[48] As it was the first accused who had conducted the negotiations with PW5 the charge against the second and third accused will succeed only if the prosecution fulfills the elements of s 34 of the Penal Code.

[49] The Supreme Court in *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 speaking through Syed Agil Barakbah SCJ held (at p 344):

> ... Section 34 of the Penal Code states:
>
> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was: (a) a common intention to commit the very offence of which the accused persons are sought to be convicted; and (b) participation in the commission of the intended offence in furtherance of that common intention.

Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused (*The Supreme Court (of India) on Criminal Law 1950–1960* by JK Soonavala at pp 188–193).

[50] The evidence against the second and third accused is chiefly if not wholly circumstantial. The evidence against them appears in PW5, PW8 and

PW9's testimonies. They are as follows.

PW5's evidence:

> 8/12/2014, perjumpaan kedua dengan Man Polong di mana dilakukan di sebuah kedai KFC di Padang Serai, Kulim Kedah. Dalam perjumpaan Man Polong bawa seorang lelaki Melayu. Saya hadir dengan Source. ...
>
> Sampai KFC Padang Serai dan saya tau pasukan serbuan dan pemerhati bersedia. Saya hubungi Man Polong dengan handphone dengan nombor-nombor yang saya sebut tadi. Lebih kurang 10–15 minit kemudian Man Polong sampai dengan seorang lelaki melayu, yang dia kata adik dia dengan nama panggilan 'Ee'. Kedua-dua mereka menaiki sebuah motorsikal. Lepas pengenalan ini baru saya tahu yang identiti lelaki Melayu yang hadir bersama pada 8/12/2014.
>
> Sebenarnya saya keluar kereta memanggil Man Polong tetapi 2 AP yang lain masih dalam kereta. Bila jumpa dengan Man Polong, dia suruh Ee balik ke kedai semula. Man Polong ingin kira duit yang saya bawa dan dia akan tunjuk jalan naik Perdana saya. AP2 dan AP3 juga dalam kereta. ...
>
> Kami henti kereta di laluan belakang, Man Poong turun seorang diri dan terus ke kedainya. Lebih kurang 5 minit kemudian saya ikut belakang dia.
>
> Man Polong minta saya tunggu di belakang kedai, di luar dengan Ee
>
> Dalam masa lebih kurang 15–20 minit, saya nampak sebuah kereta putih berjalan arah mengundur ke arah kedai tomyam. Ini semua di belakang kedai.
>
> Kereta itu berhenti dan Man Polong dari kereta itu bersama dengan seorang lelaki Melayu yang saya tidak kenali. Kereta itu berhenti dekat dengan saya lebih kurang dari sinki ke pintu keluar.
>
> (Mahkamah : lebih kurang 30ft) ...
>
> Man Polong dan lelaki Melayu ini datang kepada i dan beritahu bekalan ganja dalam kereta itu dan 'Abang mai check'. Man Polong yang beritahu.
>
> Saya pun pergi bersama Man Polong. ... Man Polong buka pintu belakang kereta itu. Dia buka pintu belakang driver. Saya tak berapa nampak. Saya minta Man Polong buka lampu dalam kereta. Man Polong buka dan saya nampak.
>
> Saya nampak 2 beg hitam biru di belakang lalu dibuka zip oleh Man Polong dan menunjukkan bekalan dadah itu serta minta saya panggil kawan saya yang pegang wang menghampiri saya.
>
> Mula-mula saya di belakang Man Polong. Bila pintu dibuka saya di sisi pintu. Ee dan lelaki Melayu itu ada di pintu kiri (penumpang hadapan). Yang saya ingat kereta itu Wish Putih No AHF 2677.
>
> Beg-beg itu di tempat duduk belakang. Hanya ada 2 beg itu sahaja.
>
> Lepas Man Polong buka beg, dia suruh saya tengok isi dalam beg itu. Saya nampak jelas kandungannya berisi ketulan-ketulan ganja dalam balutan plastik jernih lutsinat.

Beg itu beg pakaian, beg pegang. Beg berzip dan buka zip. ...

Saya panggil AP2 dan AP3 dengan melambai tangan. Saya masih di hujung kereta masa orang lari.

Man Polong, lelaki Melayu dan Ee masih di kereta semasa saya buat lamabian mereka di luar kereta.

Saya kenali dia bila dia keluar kereta wish dengan Man Polong.

Kali kedua — 8/12/2014

Perjumpaan di kedai KFC, Padang Serai, Kulim Kedah. Source juga ada bersama. Tempoh perjumpaan lebih kurang 1 jam. Mula-mula sampai saya dan Source. Ya, terus masuk kedai KFC dan minum dengan Source di situ.

OKT 1 datang dengan seorang lelaki Melayu. *Ya, lelaki Melayu itu OKT 2.*

OKT 2 datang tetapi dia berada di luar dan langsung tak terlibat dalam perbincangan dengan OKT 1 dan saya. ...

Saya setuju pada 8/12/2014 OKT 2 datang ke KFC menurunkan OKT 1.

OKT 2 ada di sekitar KFC tetapi tidak bersama kami. Lepas perbincangan saya dan Source hantar OKT 1 balik ke kedai tomyam. ...

Tidak setuju OKT 2 di sinki semasa saya sampai. Dia berada di atas motorsikal yang dia gunakan untuk hantar OKT 1 ke KFC.

Tidak setuju OKT 2 berada di sinki. OKT 2 sedang menduduki motorsikalnya di belakang masa nampak dia di kedai tomyam.

Tak pasti jarak dari kedai KFC ke kedai Tomyam. Setuju lebih kurang 1 km.

Bila OKT 1 turun dari motorsikal dia suruh OKT 2 balik ke kedai. Saya lihat OKT 2 beredar dari kawasan itu.

Ya, saya sedang sembang dengan OKT 2 apabila sebuah Wish undur ke belakang.

Ya, saya tak tahu siapa pemandu kereta itu. ...

Ya, OKT 3 ada di tempat kejadian.

Ya, OKT 3 tidak terlibat dalam perbincangan dengan saya tentang dadah.

Ya, saya tahu adalah OKT 3 keluar dari pintu kereta.

Tak pernah lihat OKT 1, OKT 2 atau OKT 3 masukkan kedua-dua beg dalam kereta itu.

Ya, saya tidak tahu sejak bila kedua-dua beg ini masuk kereta itu.

Ya, saya tidak tahu siapa yang pandu kereta itu sebelum kereta itu sampai belakang kedai itu. ... (Emphasis added.)

PW6's evidence:

Lebih kurang 8.40 malam, saya nampak sebuah motorsikal dinaiki oleh 2 orang

datang ke tempat Dahlan tunggu. Dia lebih kurang sini ke pintu.

(Mahkamah: 40–50 ft)

Mereka berbual lebih kurang 10–15 minit. Saya nampak mereka jelas tetapi tidak kenal kerana itulah kali pertama saya lihat mereka. Jelas nampak sebab lampu KFC terang.

Salah seorang naik motor balik dan keluar KFC. Seorang lagi, ikut Dahlan masuk Perdana yang kami bawa. Masa dalam kereta dah perkenalkan. Ini Man Polong — saya salam dan Dahlan suruh saya buka beg dan tunjuk apa yang ada di dalam ... Man Polong tak sentuh dan tengok saja. Saya zip beg balik dan Man Polong suruh ke Taman Serai Wangi. ...

Saya lari dan bergelut dengan orang motor. Dia bukan atas motor tetapi berdiri di situ. Bergelut tepi longkang dalam ID13(3). ...

Masa di KFC nampak OKT 2 datang hantar OKT 1. Dia datang dan turunkan OKT 1 dan balik lepas dia duduk sat.

OKT 2 sudah di belakang. ...

Ya, OKT 2 berdiri dekat-dekat kawasan sinki.

Tak dapat lihat motorsikal.

Saya tak perasan motorsikal di situ.

Tak tahu siapa yang pandu Wish.

Ya, OKT 2 tak pernah rampas pistol saya. ...

(Exh P61)

Dalam Exh P61 dikatakan Insp — cuba merampasnya.

Setuju palsu.

Saya tangkap OKT 2 di sinki — melarikan diri di semak tidak betul. ... (Emphasis added.)

PW8 (raiding officer)'s evidence:

Mereka berdua bersama-sama berjalan menghala ke bahagian lorong belakang kedai tersebut dan telah berjumpa dengan satu lagi iaitu B2, Mohd Sabree. Pada masa itu saya dapat lihat Mohd Sabree telah berada di bahagian belakang rumah kedai nombor 2265.

Selain Mohd Sabree, tiada sesiapa lagi di situ.

Saya dapat lihat juga AP1(Dahlan) bersama Abdul Rahman (OKT 1) dan OKT 2 sedang berbual.

Selepas itu saya lihat OKT 1 — Abdul Rahman telah berjalan menghala ke dalam rumah kedai 2265. Saya buat hebahan dalam walkie talkie memaklumkan perkara ini kepada semua ahli serbuan. Tak lama selepas itu saya dimaklumkan oleh Insp Tan melalui walkie talkie telah melihat OKT 1 dengan seorang lagi lelaki Melayu di

bahagian hadapan kedai dan telah berjalan menuju ke sebuah kereta jenis Toyota Wish putih No AHF 2677 yang diletakkan di bahagian hadapan deretan rumah kedai tersebut,

Selepas itu saya telah lihat Wish telah bergerak ke arah AP1 dan OKT 2 di lorong belakang rumah tersebut dengan cara mengundur. Apabila kenderaan Wish menghampiri AP1 dan OKT2 saya lihat OKT1 telah turun daripada Wish bersama seorang lagi lelaki Melayu dan pergi ke arah AP1 dan OKT2. ...

Saya lihat AP1 bersama OKT 1, OKT 2 dan OKT 3 berbincang dan berbual di bahagian belakang lorong rumah kedai tersebut. Tidak lama selepas itu saya lihat OKT1 bersama-sama AP1 pergi ke Wish dan OKT1 telah buka boot belakang Wish itu dan menunjukkan sesuatu kepada PW5.

Team saya menghampiri lorong belakang itu dan perkenalkan diri sebagai polis. Saya lihat OKT 1 bersama OKT 3 telah berlari memasuki rumah kedai 2265 manakala saya lihat OKT 2 telah berlari ke kawasan semak di belakang kedai tersebut.

Melihat akan tindakan balas itu saya dan team saya telah berusaha untuk menjejak OKT 3 yang saya lihat pada masa itu telah berjaya lari keluar dari hadapan kedai 2265 dan berlari ke arah jalan utama. Saya dibantu oleh Detektif SM Ibrahim telah berjaya menahan OKT 3 di bahagian seberang jalan hadapan kedai itu. Maksud saya OKT 3 telah berjaya melintas jalan besar. ...

Ya, OKT 1 buka boot Wish.

Betul saya tak dapat lihat apa yang ada dalam booth Wish. ...

Saya tidak dapat dengar perbualan jadi saya tidak tahu...OKT 2 sembang dengan AP1 tentang dadah atau tidak. ...

(Re examination)

Tidak setuju OKT 1, AP1 dan OKT2 sembang di sinki kerana saya dapat lihat semasa Wish undur masuk dipandu oleh OKT 1.

Dengan pakaian preman, tembakan, huru hara, adalah biasa untuk orang melarikan diri tetapi kejar mengejar dan tembakan tak berlaku pada masa yang sama.

PW9 (investigating officer's) evidence:

Insp Nor Hussien untuk rakam statement OKT 2. Dalam statement dia kata dia nampak ramai orang lari datang ke arah dia. Dia rasa tergamam. Polis suruh baring atas jalan dan polis tembak kaki dia. Dia ditanya samada dia tau dalam kereta disimpan ganja dan dia jawab tidak. ...

Statement OKT 2 — Dia kata dia ditahan di lorong belakang kedai. Dia kata dia serah diri kerana polis suruh dia jangan lari dan i baring atas jalan. Dia kata dia cedera selepas ditembak kaki kiri. Dia kata dia tidak bergelut masa ditangkap polis.

[51] It is pertinent to note that PW5 admitted that after he took off his 'kopiah', the atmosphere was one of utter commotion and it was reasonable for

anybody who was there to run away from the area. PW5 further testified that it was also not possible to know the contents of the bags as the bags were closed and it was dark. His evidence appears as follows:

> Ya, boleh wujud keadaan huru-hara di jalan belakang itu disebabkan tembakan.
>
> Ya, orang-orang akan cuba melarikan diri demi keselamatan. *Kalau OKT 1, OKT 2 dan OKT 3 cuba melarikan diri itu adalah biasa. …*

[52] PW6 testified as follows:

> Kami semua berpakaian preman.
>
> Ya, tembakan dilepaskan.
>
> Ya, bahagian belakang sunyi dan gelap. Masa tembakan keadaan jadi panik. Orang awam yang lalu di situ akan lari.
>
> Ya, keadaan cemas dan adalah biasa untuk orang lari
>
> Q : Setuju pada malam itu semua berpakaian preman dan kejar mengejar dan dengar bunyi tembakan. OKT 1, 2 dan 3 melarikan diri adalah biasa demi menjaga keselamatan diri ?
>
> A : Setuju. ...

Premised on PW5's and PW6's evidence, I find it unsafe to impute guilt and knowledge of the drugs to the seocnd and third accused's conduct of running away after the raiding party appeared at the scene.

[53] Apart from that, the evidence adduced before me showed that the second accused's role was to send the first accused to two out of three of the meetings with PW5. PW5 admitted that the second accused did not participate in any of the conversations. As a matter of fact the first accused sent him back to the tomyam shop after alighting from the motorcycle on the night of the raid. PW5's evidence appears as follows:

> Setuju OKT 2 dan OKT 3 langsung tak pernah terlibat dalam bincang atau tunjuk apa-apa kepada saya.
>
> Tanpa beg itu dibuka, tak boleh tahu apa kandungan dalam beg itu.
>
> Ya, saya lihat OKT 3 keluar dari hadapan kereta.
>
> Saya setuju kereta gelap.
>
> Q : Setuju ada kemungkinan OKT 3 tak tahu tentang beg di belakang?
>
> A: Mungkin.

[54] In addition to that the prosecution's evidence showed that the second accused was arrested at the sink. The second accused did not run away and

neither was he near the Toyota Wish. This is from the evidence of PW6 who had arrested the second accused himself (this contradicts PW8's evidence that the second accused was caught at the bushes. But I am of the view that PW6's evidence should be preferred as he was the arresting officer.

[55] PW5 admitted that he did not know who drove the Toyota Wish. And neither did he know who placed the bags in the Toyota Wish. PW8 said he saw the third accused coming out of the front passenger door. Thus the only evidence against the third accused is that he was in the Toyota Wish on the night of the raid. However, PW5 testified that the bags which contained the drugs were on the rear passenger seat. The bags were closed. PW5 also testified that even when the bags were opened, PW5 had problems viewing the contents in the bags as it was not bright enough (see also PW5's evidence reproduced at para 50). Under such circumstances it will be unsafe to presume that the third accused could have seen the drugs and therefore had knowledge of them.

[56] There was also evidence to show that the third accused had as early as the time of police investigation made an exculpatory statement. The investigating officer testified as follows:

> Statement OKT 3 — Statement oleh Insp Siti Salwa pada 16/12/2014. Statement dia operator di kilang Inokom di Jalan Padang Sera dan dia cuti sakit hari itu dan ke kedai itu untuk makan tomyam. Dia kata barang bukan dia punya dan dia tidak tahu apa-apa.
>
> Semasa Insp Siti rakam:
>
> Q : Pernahkah kamu nampak 2 beg besar warna biru hitam bertulis sports di dalam rumah yang terletak di atas bangunan kedai tomyam itu ?
>
> A : Tidak pernah.

[57] In the final analysis I find that the prosecution has failed to establish the elements of s 34 of the Penal Code against both the second and third accused as stated in *Namasiyam*. Accordingly, I directed that both the second and third accused be acquitted and discharged.

THE FIRST ACCUSED'S DEFENCE

[58] The three options were explained to the first accused. The first accused elected to give evidence on oath. He prepared a witness statement (exh D73).

[59] In his witness statement, the first accused stated that he was introduced to PW5 by his friend called 'Anas'. The first accused admitted meeting PW5 on all the three occasions. In the meetings, PW5 had asked to buy drugs but he had told PW5 that he was a cow breeder and did not sell drugs. On the night

of the raid, he did meet PW5 at the KFC. But he did so only because Anas had telephoned him to meet Anas there.

[60] According to the first accused, at the KFC, both Anas and PW5 again repeated the request for drugs. He reinterated that he was a cow breeder and did not sell drugs. He then left them for his tomyam shop. He walked back and he did not, as PW5 claimed, travelled in the Perdana.

[61] On reaching the tomyam shop, he saw the third accused. The third accused handed him a set of keys. The third accused told him that Anas left the keys and that Anas wanted him (the first accused) to drive the Toyota Wish to the back of the shop. Anas had left the shop as Anas had something to do. He acquiescenced and invited the third accused to come along.

[62] He had reversed the car to the backlane so as to make it easier for PW5 to drive out. At the backlane out of the blues, there was a commotion. A lot of people were running around there and there were gunshots. Fearing that a murder attempt was taking place, he ran into the shop and was apprehended.

[63] The first accused said he saw that Insp Tan had arrested his brother Saharbuddin. Saharbuddin was brought to where he was. At the same time Insp Tan carried the two bags which were taken from inside the shop. The two bags were the same two bags tendered in court. They were told that they were being arrested for drug offences. The first accused also denied that the Toyota Wish and the mobile number 014-2406577 were his.

[64] The first accused did not call any witness.

[65] The issue to be determined here is whether the first accused has created a reasonable doubt in the prosecution's case (*Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 considered).

[66] Dato Naran reitereated the submissions which he had made at the end of the prosecution's case. He submitted that the first accused had given a detailed chronology of the events which transpired on the day of the raid. Thus the first accused should be believed.

[67] I noted that the first accused did not call the third accused to corroborate his claim that Anas had left the keys with the third accused to pass to the first accused. The first accused also did not call Saharbuddin to testify on the recovery of the bags by Inspector Tan. I am of the view that the burden is on the defence and not the prosecution's burden to call Saharbuddin. He who asserts bears the burden of proof and in this case, the defence is asserting that

the drugs were recovered in connection with Saharbuddin's arrest. After considering the first accused's testimony I find no reason for me to depart from my earlier finding on this issue ie of where the bags were recovered.

[68] I considered PW5's testimony and asked myself if there was a reason for PW5 to manufacture false evidence against the first accused. The first accused had not suggested any motive for PW5 to do so. I also find that PW5's evidence is not something so inherently improbable that I should disbelieve him. As a matter of fact the fact that the police prepared RM60,000 for the entrapment is consistent with PW5's testimony that the first accused told him that the latter had available stock of 40kg of cannabis for sale. This is because both PW5 and the first accused had agreed to the selling price was RM1,200 for each kg. As stated above, the weight of the drugs produced in court also corroborates PW5's evidence.

[69] In the final analysis I find that the first accused's testimony is unsupported by any evidence. It amounts to only a bare denial. As such it cannot in law raise a reasonable doubt (see *Rosenizam bin Maharam v Public Prosecutor* [2003] 5 MLJ 49, *Mr Losali v Public Prosecutor* [2011] 4 MLJ 694; [2012] 2 CLJ 178, *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129).

[70] Premised on my findings and guided by *Mat v Public Prosecutor* [1963] 1 MLJ 263, I find that the defence has failed to create a reasonable doubt in the prosecution's case. Accordingly, I find the first accused guilty and convict him of an offence under s 39B of the DDA.

[71] The sentence for an offence of this nature is death. The accused is to suffer death by hanging as provided under s 39B(2) of the Dangerous Drugs Act 1952 and s 277 of the Criminal Procedure Code.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali